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TRANSCRIPT OF RECORD.

**UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT:**

No. 355-M-Admiralty.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

versus

**BARGE "ANACONDA" AND SMITH-ROWLAND COM-
PANY, INC.,**

Appellees.

**APPEAL from the District Court of the United States for
the Southern District of Florida.**

TRANSCRIPT OF RECORD.

**IN THE UNITED STATES DISTRICT COURT IN AND
FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION.**

No. 355-M-Admiralty.

THE AMERICAN SUGAR REFINING COMPANY,
Libelant,

versus

**BARGE "ANACONDA", TUG "HERCULES", SMITH-
ROWLAND COMPANY, INC., AND ATWACOAL
TRANSPORTATION COMPANY,**

Respondents.

**Bigham, Englar, Jones & Houston and
Batchelor & Dyer,**

**Proctors for The American Sugar Refining Com-
pany, Libelant.**

Cody Fowler,

**Proctor for Smith-Rowland Company, Inc.,
Respondent.**

BE IT REMEMBERED, That in the District Court of the United States in and for the Southern District of Florida in Admiralty, in the above styled cause therein pending, the following Decrees, Orders and Proceedings were had, viz:

2 On the 6th day of January, 1943, the Libelant filed its **LIBEL AND COMPLAINT**, which is in words and figures as follows, to-wit:

"To the Honorable the Judges of the United States District Court for the Southern District of Florida, Miami Division:

#355-M-Adm.

The Libel and Complaint of The American Sugar Refining Company against Barge "Anaconda", Tug "Hercules", Smith-Rowland Company, Inc., and Atwacoal Transportation Company, in a cause of contract and cargo damage, civil and maritime, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First: At all the times hereinafter mentioned, libelant was and it now is a corporation duly organized, created and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business at 120 Wall Street, County, City and State of New York.

Second: The barge "Anaconda" is now, or will be during the pendency of process hereunder, within this District and within the jurisdiction of this Honorable Court.

Third: The tug "Hercules" is now, or will be during the pendency of process hereunder, within this District and within the jurisdiction of this Honorable Court.

Fourth: At all times hereinafter mentioned, Smith-Rowland Company, Inc., was and it now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Virginia, with an office and principal place of business at Norfolk, Virginia, owning and/or operating certain vessels engaged in the carriage of cargo on the high seas, including the barge "Anaconda".

Fifth: Libelant is informed and believes, and so alleges, that respondent Smith-Rowland Company, Inc., has no office or place of business and no officer within the Southern District of Florida, but that there is, or will be during the pendency of process hereunder, certain property within the jurisdiction of this Court belonging to said respondent, to-wit, the barge "Anaconda".

Sixth: At all times hereinafter mentioned, Atwacoal Transportation Company was and it now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Massachusetts, with an office and principal place of business at 150 South Main Street, Fall River, Massachusetts, owning and/or operating certain vessels engaged in the carriage of cargo on the high seas and in the towing of vessels on the high seas, including the tug "Hercules".

Seventh: Libelant is informed and believes, and so alleges, that respondent Atwacoal Transportation Company has no office or place of business and no officer within the Southern District of Florida, but that there is or will be during the pendency of process hereunder, certain property within the jurisdiction of this Court belonging to said respondent, to-wit, the tug "Hercules".

Eighth: On or about the 9th day of December, 1942, libelant and respondent Smith-Rowland Company, Inc., entered into a contract of charter-party wherein said respondent

ent agreed to let, and libelant agreed to hire, the barge "Anaconda" for one voyage for the carriage of sugar from the port of Havana, Cuba, to Port Everglades, Florida. A copy of said charter-party will be produced hereafter.

Ninth: Under the terms of the said charter-party respondent Smith-Rowland Company, Inc., warranted that the barge "Anaconda" would be tight, staunch, strong and in every way fitted for the voyage contracted for, so far as the exercise of due diligence could make her so.

Tenth: Prior to and at the commencement of the voyage hereinafter referred to, the said barge "Anaconda" was not tight, staunch, strong and in every way fitted for the voyage contracted for, and respondent Smith-Rowland Company, Inc., had not exercised due diligence to make her so.

Eleventh: Under the terms of the charter-party, respondent Smith-Rowland Company, Inc., agreed that it would provide and pay for the services of a tug to tow the said barge from the port of Havana, Cuba, to Port Everglades, Florida.

Twelfth: In accordance with the terms of the said charter-party, on or about the 24th day of December, 1942, Cuban American Sugar Company shipped 24,865 bags of Cuban centrifugal cane sugar at Havana on the barge "Anaconda" for carriage to Port Everglades, Florida. Bills of lading covering the transportation of the said cargo were thereupon issued by a duly authorized agent of respondent Smith-Rowland Company, Inc., and Atwacoal Transportation Company, and of the barge "Anaconda" and the tug "Hercules".

Thirteenth: Thereafter the "Anaconda" sailed from the port of Havana, Cuba, in tow of the tug "Hercules" and, after some delay, arrived at Port Everglades, Florida, where a certain portion of the cargo shipped on the barge at Havana was delivered, but the portion delivered was not

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in like good order and condition as when shipped but was seriously injured and damaged through contact with sea water and/or other substances to libelant unknown, as the result of the unseaworthiness of the said barge. A certain portion of the cargo shipped on said barge has not been delivered at Port Everglades, or at any other place, and libelant believes, and so alleges, that it became totally lost during the course of transportation on the said barge in tow of said tug as the result of the unseaworthiness of the said barge.

Fourteenth: At all material times hereunder, libelant was the owner of the merchandise described in article Twelfth hereof and is entitled to bring this action.

Fifteenth: Libelant has performed all the conditions precedent on its part to be performed under the terms of the contract of the carriage.

Sixteenth: By reason of the premises, libelant has sustained damage in the sum of \$100,000.00, as nearly as the same can now be estimated, no part of which has been paid although the same has been duly demanded.

Seventeenth: All and singular the promises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Libelant prays:

1. That process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against Smith-Rowland Company, Inc., and against the barge "Anaconda", and that Smith-Rowland Company, Inc., and all persons having or claiming any interest in said barge "Anaconda" be cited to appear and answer all and singular the matters aforesaid; and that in the event the said Smith-Rowland Company, Inc., cannot be found within this District or within the jurisdiction of this Honorable Court,

then that its goods, chattels, credits and effects be attached in the amount set forth; and that this Honorable Court may be pleased to decree to libelant its damages, with interest and costs, and that the said barge "Anaconda" be condemned and sold to satisfy the claim of libelant herein and to pay to libelant herein said damages, if any, as this Honorable Court may decree to libelant, together with costs.

2. That process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against Atwacoal Transportation Company and against the tug "Hercules", and that Atwacoal Transportation Company, and all persons having or claiming any interest in said tug "Hercules" be cited to appear and answer all and singular the matters aforesaid; and that in the event the said Atwacoal Transportation Company cannot be found within this District or within the jurisdiction of this Honorable Court, then that its goods, chattels, credits and effects be attached in the amount set forth; and that this Honorable Court may be pleased to decree to libelant its damages, with interest and costs, and that the said tug "Hercules" be condemned and sold to satisfy the claim of libelant herein and to pay to libelant herein said damages, if any, as this Honorable Court may decree to libelant, together with costs.

3. That your libelant may have such other and further relief as in law and justice it may be entitled to receive.

BIGHAM, ENGLAR, JONES &
HOUSTON,

99 John Street,
New York City, New York.

and

BATCHELOR & DYER,
By O. D. BATCHELOR,
Proctors for Libelant.

532-35 Ingraham Building,
Miami, Florida.

7
State of Florida,
County of Dade, ss.

O. D. Batchelor, being duly sworn, deposes and says that he is a member of the firm of Batchelor & Dyer, proctors for libelant herein; that he has read the foregoing libel, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief. That the reason this verification is made by deponent and not by libelant is that libelant is a corporation, none of the officers of which is now within this jurisdiction.

That the sources of deponent's information consist of data advanced to him by New York proctors for libelant, based on documents in possession of these New York proctors.

O. D. BATCHELOR.

Subscribed and sworn to before me this 6th day of January, A. D. 1943.

(N. P. Seal)

MILDRED M. SMITH,
Notary Public, State of Florida
at Large.

My Commission expires: February 19, 1944."

7 On the 6th day of January, 1943, STIPULATION FOR LIBELANT'S COSTS was filed, in words and figures following:

"United States District Court, Southern District of Florida:

Stipulation for libelant's costs, entered into pursuant to the rules and practice of this Court.

Whereas, a libel will be filed in this Court on or about the 6th day of January, 1943, by The American Sugar Refin-

ing Company, a New Jersey corporation, against barge "Anaconda", tug "Hercules", Smith-Rowland Company, Inc., and Atwacoal Transportation Company, for the reasons and causes in said libel mentioned; and praying that process may issue against said respondents, and the said libelant and Fidelity and Deposit Company of Maryland, stipulator, parties hereto, hereby consenting and agreeing that in case costs are awarded against the said libelant or said stipulator, the decree therefor not exceeding the sum of Three Hundred and Fifty (\$350.00) Dollars, may be entered against them and each of them, and thereupon execution may issue against their, and each of their, goods, chattels, lands and tenements, or other real estate.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the libelant herein and the stipulator undersigned, Fidelity and Deposit Company of Maryland, having its principal place of business in the City of Baltimore and State of Maryland, qualified to do business in the State of Florida, shall be, and each of them is hereby bound in the sum of Three Hundred and Fifty (\$350.00) Dollars, conditioned that they shall pay all costs and expenses which shall be awarded against the said libelant and/or stipulator undersigned, or any one of them, by decree of this Court, and in case of appeal, by any Appellate Court.

THE AMERICAN SUGAR RE-
FINING COMPANY, a New
Jersey Corporation,

By O. D. BATCHELOR,
Agent and Proctor.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
(Corp. Seal)

By J. J. WICKER,
Stipulator and Att'y-in-Fact.

Taken and approved before me this 6th day of January, 1943.

EDWIN R. WILLIAMS,
Clerk U. S. Dist. Court,
By EARLE F. SPRIGG,
Deputy Clerk.

9 On the 6th day of January, 1943, ORDER FOR PROCESS was filed, the same being in words and figures as follows, to-wit:

(Title Omitted.)

"The Libel filed herein having been duly considered and it appearing that Stipulation for costs has been filed,

It is Ordered that process of citation, monition and attachment do issue herein according to law.

Done and Ordered at Miami, this, 6th day of January, 1943.

JOHN W. HOLLAND,
Judge U. S. District Court,
Southern District of Florida."

On the 7th day of January, 1943, REQUEST FOR DISMISSAL was filed, the same being in words and figures as follows, to-wit:

(Title Omitted.)

"To the Honorable John W. Holland, United States District Judge:

Please sign the Order submitted herewith for dismissal of the above case as to the tug "Hercules" and Atwacoal Transportation Company, its alleged owner.

BIGHAM, ENGLAR, JONES &
HOUSTON and
BATCHELOR & DYER,
By O. D. BATCHELOR,
Proctors for Libelant."

On the 7th day of January, 1943, an ORDER OF THE COURT was filed, same being in words and figures following:

(Title Omitted.)

"In conformity with the petition of libelant in this cause,

It is hereby Ordered that this cause be and it hereby is dismissed as to the tug "Hercules" and Atwacoal Transportation Company, its alleged owner, and said tug is hereby Ordered released from the attachment.

Done and Ordered at Miami, Florida, this 7th day of January, A. D. 1943.

JOHN W. HOLLAND,
U. S. District Judge."

10 On the 9th day of January, 1943, NOTICE OF SPECIAL APPEARANCE AND EXCEPTION TO JURISDICTION was filed, same being in words and figures following:

(Title Omitted.)

"Sirs:

Smith-Rowland Company, Inc., by its proctor, Cody

Fowler, hereby appears in this suit specially and solely for the purpose of contesting the jurisdiction of this Court and for no other purpose.

Said Smith-Rowland Company, Inc., appearing specially, hereby excepts to the jurisdiction of this Court, the said Smith-Rowland Company, Inc., being a corporation existing under and by virtue of the State of Virginia, with no office, place of business or agent within the State of Florida; that the said charter party referred to in paragraph Eighth of said libel, the same being the basis for the purported claim for damages upon which said libel is based and paragraph or clause designated 15 therein among other things states:

'Fifteenth: Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9, of U. S. C., Chapter 213 of the Act of Feb. 12, 1925, 43 Stat. 833) except that the provision of Section 8 thereof shall not apply to any arbitration thereunder.'

(Copy of said charter party will be produced to this Honorable Court upon presentation of this Special Appearance.)

That the sole basis for the filing of the libel in this action and the issuance of the attachment thereunder is based upon paragraph Eighth of Title 9, U. S. C., same being U. S. Arbitration Act, which the said parties to said charter party specifically eliminated, therefore, any benefits or rights under said section is not available to the libellant, the sole purpose of said section 8 being to give the aggrieved party the benefit of jurisdiction in rem and the benefit of security obtained by attachment, which under

said paragraph of clause 15 of said charter party is not available to libelant.

Wherefore, the libelant has no right to any benefits under the libel filed herein, the Court has no jurisdiction of the Barge 'Anaconda' nor of Smith-Rowland Company, Inc., and said cause should be dismissed, said attachment dissolved, and said Barge 'Anaconda' restored to the Master and owner thereof.

CODY FOWLER,
Proctor for Smith-Rowland
Company, Inc.

State of Florida,
County of Dade.

Before me, the undersigned authority, personally appeared Cody Fowler, who first having been sworn, deposes and says that he is proctor for the Smith-Rowland Company, Inc., and authorized to file the above and foregoing Special Appearance and make this affidavit; that the facts set forth in the above affidavit are true according to his best information and belief after investigation and communication with Smith-Rowland Company, Inc., and their agents, and that there is no officer or agent in the State of Florida of said Smith-Rowland Company, Inc., qualified to make this affidavit.

CODY FOWLER.

Sworn to and subscribed before me this 8th day of January, 1943.

(N. P. Seal)

MARY GIVENS,
Notary Public, State of Florida
at Large.

My Comm. expires 2/11/44."

11 On the 9th day of January, 1943, an ORDER OF
~~THE COURT~~ was filed, same being in words and
figures following:

(Title Omitted.)

"It appearing to the Court that Special Appearance has
been filed herein by Smith-Rowland Company, Inc., and
the same should be disposed of forthwith, it is, therefore,

Ordered that said Special Appearance be presented for
argument and disposition before me at my office in the
Federal Building, Miami, Florida, at 3:30 P. M., Tuesday,
January 12, 1943, together with any other motions which
the said Smith-Rowland Company, Inc., through its proc-
tor, may deem it necessary to file, providing substantial
copies thereof have been served upon the proctors for the
libelant.

It is further Ordered that libelant and Smith-Rowland
Company, Inc., take due notice of such hearing.

Done and Ordered at Miami, Florida, this the 9th day of
January, 1943.

JOHN W. HOLLAND,
U. S. District Judge."

12 On the 11th day of January, 1943, PROOF OF
PUBLICATION was filed in words and figures as
follows:

"Miami Review and Daily Record.

Published Daily Except Sunday.

Miami, Dade County, Florida.

State of Florida,
County of Dade.

Before the undersigned authority personally appeared W. J. T. Long, who on oath says that he is the business manager of the Miami Review and Daily Record, a daily (except Sunday) newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a legal Advertisement or Notice in the matter of

The American Sugar Refining Co.

vs.

Barge 'Anconda'

in the U. S. District Court, was published in said newspaper in the issues of Jan. 8, 1943, Ct. No. 355-M-Adm.

Affiant further says that the said Miami Review and Daily Record is a newspaper published at Miami, in said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day (except Sunday) and has been entered as second class mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in said newspaper.

W. J. T. LONG.

Sworn to and subscribed before me this 8 day of January, A. D. 1943.

RUTH EBMEIER,

(Seal)

Notary Public, State of Florida
at Large.

My Commission expires June 12, 1943."

The United States of America, Southern District of Florida. Whereas, on the 6th day of January, 1943, The American Sugar Refining Company, a New Jersey corporation, filed its libel in the District Court of the United States for the Southern District of Florida against the Barge "Anaconda", in a cause of Contract and Cargo Damage Civil and Maritime. And Whereas, by virtue of process in due form of law to me directed, returnable on the 21st day of January, 1943, I have seized and taken the said Barge "Anaconda", and have her in my custody. Notice is Hereby Given, that a District Court will be held in the United States Court Room, in the City of Miami, Florida, on the 21st day of January, 1943, for the trial of said premises and the owner or owners, and all persons who may have or claim any interest, are hereby cited to be and appear at the time and place aforesaid, to show cause, if any they have, why a final decree should not pass as prayed. Chester S. Dishong, U. S. Marshal.

13

On the 12th day of January, 1943, ATTACHMENT was filed in words and figures as follows:

District Court of the United States, Southern District of Florida, In Admiralty.

#355-M-Adm.

The President of the United States of America.

To the Marshal of the Southern District of Florida, Greeting:

You Are Hereby Commanded forthwith to seize and take into your custody the tug "Hercules" now at the port of Port Everglades, Florida, or wherever the same may be found within said District, and safely to keep the

said tug "Hercules" and have the same before this Court at Miami, in said District, on the 21st day of January, A. D. 1943, to answer to the Libel of The American Sugar Refining Company, a corporation, for cargo loss and damage in the sum of One Hundred Thousand Dollars, and how you execute this Writ make known by your return hereof, hereupon indorsed at Miami, in said District, on or before the said 21st day of January, A. D. 1943.

Witness, The Honorable John W. Holland, Judge of said Court, and the Seal thereof, at Miami, this 6th day of January, A. D. 1943.

EDWIN R. WILLIAMS,
Clerk.

(Ct. Seal)

By ALBERT E. CALL,
Deputy Clerk.

Return of the United States Marshal for the Southern
District of Florida.

Received this writ at Miami, Florida, January 6, 1943, and executed it at Port Everglades, Florida, January 6, 1943, by exhibiting this original writ to Billy Jackson, Acting Captain, and taking into my custody the within named Tug Hercules, and placing it in charge of Reed Bryan, as Custodian at a compensation of \$3.00 per day, dockage to be \$1.49 per day.

Fee	2.00
Exp.	1.98

Total	3.98
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CHESTER S. DISHONG,
U. S. Marshal,

By ALBERT F. HUNT,
Deputy U. S. Marshal.

On the 12th day of January, 1943, MONITION was filed, in words and figures as follows:

District Court of the United States, Southern District of Florida.

#355-M-Adm.

The President of the United States.

To Chester S. Dishong, Esq., the Marshal of the United States for the Southern District of Florida—Greeting:

Whereas, on the 6th day of January, A. D. 1943, The American Sugar Refining Company, a corporation, by its Proctor, O. D. Batchelor, Esq., filed in the office of the Clerk of said Court Complaint and Libel against the tug "Hercules" in a cause of contract and cargo damage civil and maritime, alleging in substance that part of cargo was lost, and that which was not lost was seriously injured and damaged through contact with sea water and/or other substances to libelant unknown.

Wherefore, the said libelant pray that the usual process of attachment may issue against the said tug "Hercules" that monition may issue, citing all parties having or claiming any interest or property in said tug "Hercules" to appear and answer upon oath, all and singular, the matters aforesaid; and that this Court will be pleased to decree to the libelant the sum of One Hundred Thousand (\$100,000.00) Dollars for services in said cause, and that the said tug "Hercules" may be condemned and sold, if necessary, to pay said \$100,000.00 with costs, charges, and expenses, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive. And, whereas, the Judge of said Court has ordered that attachment and monition be issued as prayed, returnable on Thursday, the 21st day of January, A. D. 1943.

Now, Therefore, you are hereby commanded forthwith to cite and admonish all persons whomsoever having any right, title, claim, or interest in or to the said tug "Hercules" to appear at an Admiralty Session of said Court, to be held in the rooms of said Court at Miami, in said District, on Thursday, the 21st day of January, A. D. 1943, at 10:30 o'clock in the forenoon of that day, to show cause, if any they have, why said sum should not be decreed according to the prayer of the libellant, and to attend upon every session of said Court, from that time held, until a final decree shall be rendered in the premises.

And this you are required to do by serving on the Master, Agent, or Owner of said vessel a true copy hereof, and by publishing notice once in the Miami Review and Daily Record, a newspaper published in said District.

And how you shall have executed this precept, make known to this Court by a return hereof on or before the 21st day of January, 1943, aforesaid, with your certificate of execution hereof written.

Witness, the Hon. John W. Holland, Judge of said Court at Miami in said District, this 6th day of January; in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the hundred and sixty-seven.

(Ct. Seal)

EDWIN R. WILLIAMS,
Clerk, U. S. District Court,
Southern District of Florida,

ALBERT E. CALL,
Deputy Clerk.

Return of the United States Marshal for the Southern
District of Florida.

Received this writ at Miami, Florida, January 6, 1943, and executed it at Fort Everglades, Florida, January 6, 1943, by exhibiting this original writ and delivering a true copy hereof to Billy Jackson, Acting Captain of Tug Hercules.

Fee	2.00
Proclamation ..	.30
	<hr/>
Total	2.30

CHESTER S. DISHONG,
U. S. Marshal,
By ALBERT F. HUNT,
Deputy U. S. Marshal."

15 On the 12th day of January, 1943, WRIT OF
RESTITUTION was filed, in words and figures as
follows:

(Title Omitted.)

"The President of the United States of America.

To the Marshal of the Southern District of Florida, Greeting:

Whereas, In a certain cause lately pending in the above-styled Court, on behalf of The American Sugar Refining Company, a corporation, against Tug 'Hercules' and Atwacoal Transportation Company by virtue of a Writ of Attachment issued out of said Court in said cause certain property, to-wit: The vessel Tug 'Hercules' and Atwacoal Transportation Company has been seized by you and is now in your possession; and,

Whereas, said cause has terminated and the claimant (owner) (agent of the owner) thereof is now entitled to possession of the said property, now these presents are to command you, the said Marshal, to relinquish the possession of the said property from whom seized upon receiving into your hand your expenses for the care and custody of the said property.

Hereof fail not; and how you have executed this writ make known by your return indorsed hereupon.

Witness, The Honorable John W. Holland, Judge of said Court, and the seal thereof, at Miami, Fla., in said District, this 7th day of January, A. D. 1943.

EDWIN R. WILLIAMS,

Clerk,

(Ct. Seal)

By ANNA M. FITZSIMMONS,

Deputy Clerk.

Return of the United States Marshal for the Southern District of Florida.

Received this writ at Miami, Florida, January 7, 1943, and executed it at Miami, Florida, January 7, 1943, by exhibiting this original writ to O. D. Batchelor, Proctor for libellant, and releasing the within named vessel into his custody.

Fee \$2.00

Mileage06

\$2.06

CHESTER S. DISHONG,

United States Marshal,

By AL L. GATES,

Deputy."

On the 12th day of January, 1943, ATTACHMENT was filed in words and figures as follows:

District Court of the United States, Southern District of Florida, In Admiralty.

#355-M-Adm.

The President of the United States of America.

To the Marshal of the Southern District of Florida, Greeting:

You Are Hereby Commanded forthwith to seize and take into your custody the barge "Anaconda" now at the port of Port Everglades, Florida, or wherever the same may be found within said District, and safely to keep the said barge "Anaconda" and have the same before this Court at Miami, in said District, on the 21st day of January, A. D. 1943, to answer to the Libel of The American Sugar Refining Company, a corporation, for cargo loss and damage in the sum of One Hundred Thousand Dollars, and how you execute this Writ make known by your return hereof, hereupon indorsed at Miami, in said District, on or before the said 21st day of January, A. D. 1943.

Witness, The Honorable John W. Holland, Judge of said Court, and the Seal thereof, at Miami, this 6th day of January, A. D. 1943.

EDWIN R. WILLIAMS,
Clerk,

(Ct. Seal)

By ALBERT E. CALL,
Deputy Clerk.

Return of the United States Marshal for the Southern District of Florida.

Received this writ at Miami, Florida, January 6, 1943, and executed it at Port Everglades, Florida, January 6, 1943, by exhibiting this original writ to John Colvin, and taking into my custody the within named Barge "Anaconda", and placing it in charge of Reed Bryan as custodian at a compensation of \$3.00 per day, dockage charges at rate of \$22.17 per day.

Fee	2.00
Exp.	2.00
	<hr/>
Total	4.00

CHESTER S. DISHONG,
U. S. Marshal,
By ALBERT F. HUNT,
Deputy U. S. Marshal.

16 On the 12th day of January, 1943, Monition was filed, in words and figures as follows:

District Court of the United States, Southern District of Florida.

#355-M-Adm.

The President of the United States.

To Chester S. Dishong, Esq., the Marshal of the United States for the Southern District of Florida—Greeting:
Whereas, on the 6th day of January, A. D. 1943, The American Sugar Refining Company, a corporation, by its Proctor, O. D. Batchelor, Esq., filed in the office of the Clerk of said Court Complaint and Libel against the barge "Anaconda" in a cause of contract and cargo damage civil

and maritime, alleging in substance that part of cargo was lost, and that which was not lost was seriously injured and damaged through contact with sea water and/or other substances to libelant unknown.

Wherefore, the said libelant pray that the usual process of attachment may issue against the said barge "Anaconda" that monition may issue, citing all parties having or claiming any interest or property in said barge "Anaconda" to appear and answer upon oath, all and singular, the matters aforesaid; and that this Court will be pleased to decree to the libelant the sum of One Hundred Thousand (\$100,000.00) Dollars for services in said cause, and that the said barge "Anaconda" may be condemned and sold, if necessary, to pay said \$100,000.00 with costs, charges, and expenses, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive. And, whereas, the Judge of said Court has ordered that attachment and monition be issued as prayed, returnable on Thursday, the 21st day of January, A. D. 1943.

Now, Therefore, you are hereby commanded forthwith to cite and admonish all persons whomsoever having any right, title, claim, or interest in or to the said barge "Anaconda" to appear at an Admiralty Session of said Court, to be held in the rooms of said Court at Miami, in said District, on Thursday, the 21st day of January, A. D. 1943, at 10:30 o'clock in the forenoon of that day, to show cause, if any they have, why said sum should not be decreed according to the prayer of the libelant, and to attend upon every session of said Court, from that time held, until a final decree shall be rendered in the premises.

And this you are required to do by serving on the Master, Agent, or Owner of said vessel a true copy hereof, and by publishing notice once in the Miami Review and Daily Record, a newspaper published in said District.

And how you shall have executed this precept, make known to this Court by a return hereof on or before the 21st day of January, 1943, aforesaid, with your certificate of execution hereof written.

Witness, the Hon. John W. Holland, Judge of said Court at Miami in said District, this 6th day of January, in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the hundred and sixty-seven.

EDWIN R. WILLIAMS,
Clerk, U. S. District Court,
Southern District of Florida,

(Ct. Seal)

ALBERT E. CALL,
Deputy Clerk.

Return of the United States Marshal for the Southern
District of Florida.

Received this writ at Miami, Florida, January 6, 1943, and executed it at Fort Everglades, Florida, January 6, 1943, by exhibiting this original writ and delivering a true copy hereof to John Colvin, Captain of the within named vessel, Barge Anaconda, and by publishing Monition time in the, a daily newspaper published at Miami, in the Southern District of Florida, January, 1943.

Fee	2.00
Proclamation30

Total	2.30
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CHESTER S. DISHONG,
U. S. Marshal,
By ALBERT F. HUNT,
Deputy U. S. Marshal.

18. On the 14th day of January, 1943, this Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW was filed, in words and figures as follows:

(Title Omitted.)

"The barge 'Anaconda' is under libel filed January 6, 1943, by The American Sugar Refining Company against the said barge and Atwacoal Transportation Company, to a cause of contract and cargo damage, civil and maritime. Atwacoal Transportation Company appears specially and contests the jurisdiction of the Court, asserting that said respondent is a corporation under the laws of the State of Virginia, with no office, place of business, or agent, within the State of Florida, and that the charter party between the libelant and said respondent contains a clause as follows:

'Fifteenth: Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9, of U. S. C. A., Chapter 213 of the Act of Feb. 12, 1952, 43 Stat. 833) except that the provisions of Section 8 thereof shall not apply to any arbitration thereunder.

Respondent also asserts that the sole basis for the filing of the libel in this action, and the issuance of the attachment thereunder, was based upon 9 U. S. C. A. 8, same being the United States Arbitration Act, which the parties specifically eliminated. Respondent concludes with the assertion that any benefits or rights under said Section are not available to the libelant, the sole purpose of said Section being to give the aggrieved party the benefit of jurisdiction in rem, and the benefit of security obtained by attachment,

which under said Clause 15 of the charter party is not available to the libelant. Said respondent concludes that the libelant has no right to any benefits under the libel in this case, that the Court has no jurisdiction of the barge Anaconda, nor of Smith-Rowland Company, Inc., and that the cause should be dismissed, the attachment dissolved, and the Anaconda restored to the master and owner.

The special appearance was treated as a motion to dismiss, and on notice the cause was heard on January 12, 1943. At the hearing, which was attended by proctors for the libelant and the respondent, photostatic copies of the charter party and of the bill of lading were introduced in evidence, and the case submitted.

Findings of Fact.

The charter party was made and concluded December 9, 1942, between Smith-Rowland Company, Inc., owner of the barge Anaconda and The American Sugar Refining Company, charterer. The charter party contains Clause 15 as follows:

'Fifteenth. Any and all differences and disputes of whatsoever nature arising out of this charter party shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9 of U. S. C., Chapter 213 of the Act of February 12, 1952, 43 Stat. 833) except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder. The decision of any two of the three on any point or points shall be final. Either party hereto may for such arbitration by service upon any other officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such

party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator had been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge or any Court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this Clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

Bill of lading duly issued December 24, 1942, acknowledging receipt for shipment of a certain number of bags of cane sugar at Havana, Cuba, from The Cuban American Sugar Company, shipper, to The American Sugar Refining Company, consignee, with the destination of port of discharge from the ship as Port Everglades, Florida.

Conclusions of Law.

I first approach the case from an abstract standpoint. The Arbitration Act of February 12, 1925, gave validity,

with incident enforceability, to arbitration agreements with reference to maritime transactions or those involving interstate commerce. Arbitration encroaches upon the functions of the Courts in the settlement of controversy, but there is a studied effort in the Arbitration Act to provide for the enforceability in designated tribunals of the decisions reached by Arbitration boards. Where one party to a controversy institutes a Court action, and the adversary brings to the attention of the Court the fact that arbitration had been agreed to between the disagreeing parties, provision is made for the stay of such Court action awaiting the determination of the arbitrators. Likewise, provision is made for action by the Courts in appointing an arbitrator when the organization of the arbitration board is being brought about by the failure, neglect, or the refusal of one of the parties. By Section 8 there is preserved the recognized right of a proposed libellant to proceed with libel to obtain the seizure of the vessel or other property of the alleged offending party. By written agreement members to a charter party may agree for arbitration of their differences, and may further agree to forego the rights preserved by Section 8 during the period of arbitration. Thereby the parties to the charter party do not attempt to do violence to Courts of admiralty in the exercise of jurisdiction over parties and subject matter. Section 8 preserves the right of obtaining security for the enforcement of the arbitration award, and if parties to a written agreement see occasion to waive that right, and by solemn agreement provide that no libel is to be filed, and no vessel or other property seized prior to the award of the arbitration board, and at the same time they provide that the arbitration award may be enforced in a specified manner is securing the enforcement process of the Courts, then, in that event, it seems perfectly clear that the parties have done no violence to, and have not disturbed recognized jurisdiction of, Courts of Admiralty.

Next I proceed to examine the charter party, and apply this principle of law in the abstract to this case now presented. It is very clear from the charter party that the parties agreed that their differences or disputes should be put to arbitration pursuant to the Arbitration Act, with a very definite exception as to provisions of Section 8 of the Act. Libelant contends that this provision is not pertinent here because there is at this time in process of operation no arbitration proceedings. But the determining factor is not at this time whether there is any pending arbitration, but on the other hand the parties have agreed that if the right to arbitrate exists, then in that event Section 8 is not to apply. The charter party continues with a clear provision for the appointment of an arbitrator, and application to a Judge of any Court of maritime jurisdiction in the city at the final place of discharge of the cargo. And further, the agreement provides that awards made in pursuance of the arbitration may become a judgment in any Court having jurisdiction in the premises. The parties agreed to forego the security that comes from the filing of a libel and the seizure of the vessel or other security, and preserved all the attributes of a Court of Admiralty for the enforcement of the arbitration award.

The libelant strongly contends that with the institution of the libel proceedings, with the seizure of the Anaconda prior to any arbitration proceedings being instituted, that Section 3 applies and that this suit should not be dismissed, and at most that the trial be stayed until the coming in of the arbitration award. An application of Section 3 would destroy the effect of the agreement of the parties.

I hold that the parties to this charter party definitely agreed to forego the security that is obtained by the filing of a libel; they definitely agreed to forego that privilege during arbitration, and expressly made provision for the

full recognition of admiralty jurisdiction in the enforcement of the arbitration award. The mere fact that one of the parties filed the libel prior to the appointment of any or all of the arbitrators is not to interfere with the agreement of the parties, which is that difference and disputes arising out of the charter party are to be put to arbitration pursuant to the Act, and that the provisions of Section 8 of the Act are not to apply to any arbitration. I construe this clause to include arbitration sought before the filing of a libel as well as arbitration after an attempted effort to litigate by libel proceedings. The libelant has contravened and violated the express provisions of the charter party in filing the libel. A libel improperly filed should be dismissed.

Libelant relies upon certain provisions of the bill of lading. This contention adds no weight to the libelant's position. The agreement set forth in the bill of lading as determining the rights of the parties here should be applied by the arbitrators.

Having arrived at these conclusions, I have this day signed an order dismissing this action.

At Miami, Florida, this 14th day of January, 1943.

JOHN W. HOLLAND,
United States District Judge."

22 On the 14th day of January, 1943, this Court's ORDER was filed, in words and figures as follows:

(Title Omitted.)

"This cause coming on this day to be heard upon the Special Appearance filed herein by Smith-Rowland Company, Inc., contesting the right of the libelant, and assert-

ing that under the provisions of the charter party upon which the libel is based the libelant had and has no right to file or maintain this libel, the parties being represented by their respective proctors, and after hearing argument and being fully advised, the Court finds that said Special Appearance should be sustained. It is, therefore,

Ordered, that the libel filed herein be and the same is hereby dismissed and that the attachment heretofore issued herein against the Barge 'Anaconda' be and the same is hereby dissolved and the Marshal of this Court be and he is hereby Ordered to re-deliver possession of the said Barge 'Anaconda' to the custody of the Master or owner thereof.

It is further Ordered that the libelant pay all costs incurred herein.

Done and Ordered at Miami, Florida, this January 14th, 1943, as of the 12th day of January, 1943.

JOHN W. HOLLAND,
U. S. District Judge."

23 On the 19th day of January, 1943, WRIT OF RESTITUTION was filed, in words and figures as follows:

(Title Omitted.)

"The President of the United States of America.

To the Marshal of the Southern District of Florida, Greeting:

Whereas, In a certain cause lately pending in the above-styled Court, on behalf of American Sugar Refining Company against Barge 'Anaconda' by virtue of a Writ of Attachment issued out of said Court in said cause certain property, to-wit: The vessel Barge 'Anaconda' has been seized by you and is now in your possession; and,

Whereas, Said cause has terminated and the claimant (owner) (agent of the owner) thereof is now entitled to possession of the said property, now these presents are to command you, the said Marshal, to relinquish the possession of the said property from whom seized upon receiving into your hand your expenses for the care and custody of the said property.

Hereof fail not; and how you have executed this writ make known by your return indorsed hereupon.

Witness, The Honorable John W. Holland, Judge of said Court, and the seal thereof, at Miami, Fla., in said District, this 14th day of January, A. D. 1943, as of the 12th day of January, 1943.

EDWIN R. WILLIAMS,
Clerk,

(Ct. Seal)

By **ANNA M. FITZSIMMONS,**
Deputy Clerk.

Return of the United States Marshal in and for the
Southern District of Florida.

Received this writ at Miami, Florida, January 12th, 1943, and executed it at Miami, Florida, on January 12th, 1943, by exhibiting this original writ to C. D. Batchelor of the Law Firm of Batchelor and Dyer, Miami, Florida, as attorneys for Libelant and releasing the within named Barge 'Anaconda' into his custody.

Fee	\$2.00
Mileage06
Total	\$2.06

CHESTER S. DISHONG,
United States Marshal,
By **ELIZABETH S. SIMPSON,**
Deputy."

ATWACOAL TRANSPORTATION COMPANY

Telephone
Fall River 7-9461

150 SOUTH MAIN STREET

FALL RIVER, MASS.

U. S. ATLANTIC COAST, GULF, AND CARIBBEAN TRADES

RECEIVED from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition, unless otherwise indicated in this bill of lading, to be transported subject to all the terms of this bill of lading with liberty to proceed via any port or ports within the scope of the voyage described herein, to the port of discharge or so near thereto as the vessel can always safely get and leave, always subject to all stages and conditions of water and weather, and there to be delivered or transhipped on payment of the charges thereon. If the goods in whole or in part are short out from the vessel named herein for any cause, the Carrier shall have liberty to forward them under the terms of this bill of lading on the next available vessel.

It is agreed that the custody and carriage of the goods are subject to the following terms on the face and reverse hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, Master and vessel in every contingency, whereunder and whenever occurring, and also in the event of deviation, or of unseaworthiness of the vessel at the time of loading or inception of the voyage or subsequently, and none of the terms of this bill of lading shall be deemed to have been waived by the Carrier unless by express waiver signed by a duly authorized agent of the Carrier:

Barge: "AMACONDA" (745) Voyage No. _____

Port of Loading: LA HABANA, CUBA

Shipper: THE CUBAN AMERICAN SUGAR COMPANY

Consignee: GENERAL THE AMERICAN SUGAR REFINING COMPANY or assigns

If consigned to Shipper's Order arrival notice to be addressed to: _____

(Without Liability to carrier, see Clause 11 hereof)

Port of Discharge from Ship: PORT EVERGLADES, Fla.

(If goods to be transhipped at port of discharge):

Destination of Goods: PORT EVERGLADES, Fla.

(See Clause 10 hereof):

THE SCOPE OF THE VOYAGE IS DESCRIBED IN CLAUSE 3 HEREOF
PARTICULARS FURNISHED BY SHIPPER OF GOODS

MARKS AND NUMBERS	QUANTITY OR NUMBER OF PIECES OR PACKAGES	DESCRIPTION OF GOODS	GROSS WEIGHT POUNDS	MEASUREMENT
DELICIAS				
	13,760	BAGS OF CUBAN CENTRIFUGAL CANE SUGAR		
		GROSS WEIGHT: 4,549,800 American Pounds		
		TARE: 34,400 "		
		NET WEIGHT: 4,515,400 "		
Bags short shipped.				

NOT NEGOTIABLE

Abstract

13,760

BAGS OF CUBAN CENTRIFUGAL CANE SUGAR

GROSS WEIGHT: 4,500,000 American Pounds
TANK: 24,400 " "

NET WEIGHT: 4.850.200

• Bags short shipped.

COPY NOT NEGOTIABLE

"This document contains information affecting the national defense of the United States within the meaning of the Espionage Act, 50 U. S. C. 31 and 32 as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law."

(Sgt.) E. S. LAND
ADMINISTRATOR

WAR SHIPPING ADMINISTRATION

Short in dispute

If Co-Defendant Is Discovered

24 DIC 1942

3 ORIGINAL SIGNED

@	per 100 lbs.	\$
@	per 2240 lbs.	\$
@	per cub. ft.	\$
@	per cub. ft.	\$
@		\$

IN ACCEPTING THIS BILL OF LADING, the goods agree to be bound by all of its conditions, printed or attached on the back or both sides.

ATWADDAL TRANSPORTATION

*FREIGHT TO BE PREPAID—TO COLLECT. 8...

* (Cross out words not applicable.)

Terms of Bill of Lading continued

WAR SHIPPING ADMINISTRATION SUGAR CHARTER PARTY

THIS Charter Party, made and concluded the 9th day of December, 1942
between **SMITH-BOWLAND COMPANY, INC.** Owner **Chartered Owner**
of the good **American** ^{**Barge**} ~~**Vessel**~~ **"ANACONDA"** of **Norfolk**
built **1921** at **Kingston, N. Y.**
classed **not classed** at of the measurement of
2100 tons net register according to **U.S. Cert. No. 117 FB now trading**
and **American Sugar Refining Company** Charterer

WITNESSETH, That the said Owner agrees on the freighting and chartering of the whole of said Vessel (with the exception of the deck, cabin and necessary room for the crew and storage of provisions, sails, cables and fuel), or sufficient room for the cargo hereinafter mentioned to the Charterer, for a voyage from **Havana, Cuba**

Vessel to load at not more than two berths or loading places in any one port or its jurisdiction, same to count as one port of loading, ~~except that if Vessel loads in the Chesapeake District, only one port to be used at the one-port rate, or as near thereunto as she can safely proceed and always lie afloat with safety, to~~ **Port Everglades, Florida**

~~to be declared upon signing of Bills of Lading (Charter Party), on the following terms and conditions:~~

First. The said Vessel shall be tight, staunch, strong, and in every way fitted for such a voyage as far as the exercise of due diligence can make her so, and, except as hereinafter provided as to seaworthiness and latent defects, shall receive on board during the aforesaid voyage the merchandise hereinafter mentioned.

Second. The Vessel, her Master and Owner, shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: Any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer, the Owner, the shipper or consignee of the cargo, their agents or representatives, insufficiency of packing, insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: Act of God, act of war, act of public enemies, pirates, or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion. The Vessel shall have liberty to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress and to deviate for the purpose of saving life or property or of landing any ill or injured person on board. No exemption afforded to the Charterer under this clause shall diminish its obligations for hire under the other provisions of this Charter.

Any time used rigging, removing hatches and preparing staging to count as lay time unless done before lay time commences. At discharging port, in the event of strike of stevedores or other ship's servants, the lay days for discharging shall begin at first working period after settlement of strike, unless discharge begins sooner.

In more three (3)

Cargo to be received at port of discharge at the rate of not less than 10,500 bags of about 330 pounds each, or equivalent, per running day of 24 hours, weather permitting, Sundays and holidays not excepted.

Lay days are not reversible.

If Vessel is unable to load or discharge at the rates provided, lay days shall be computed on the basis of the Vessel's capacity for loading or discharging.

Stevedores at loading port to be appointed by Owner or his agent, Vessel paying rates not exceeding those in effect at loading port on March 16, 1942, including compensation insurance and other charges of any nature pertaining to loading. The rate of freight mentioned above is predicated on such stevedoring rates and any increase in same to be for account of cargo.

If cargo is discharged at a Florida or U. S. Gulf port for transshipment to a refinery at another U. S. port, Charterer will designate wharf or dock at which cargo is to be discharged and will nominate stevedores to perform the discharging operation at current rates, it being further understood that rates for stevedoring are not to exceed those in effect at New Orleans refineries on September 15, 1941. If Vessel discharges at any refinery, receivers to appoint stevedores, same to be paid for by the Owner, but it is understood and agreed that any increase in the cost of stevedoring for raw sugar at a refinery in excess of the rates current September 15, 1941, is to be for account of cargo.

It is understood that the cargo is to be received and delivered alongside the Vessel within reach of the ship's tackle, and any lighterage is to be at the risk and expense of the cargo.

Demurrage in loading and discharging, except as otherwise provided herein, shall be payable by the

Charterer or his agent, day by day, on the basis of \$650.00 cents U. S. Currency per net ton, based tonnage of Vessel per day. Despatch money in loading and discharging shall be payable to the

Charterer or his agent, if earned, at the rate of cents U. S. Currency per net ton.

Tared tonnage of Vessel per lay day saved on cargo vessels and at the rate of cents

U. S. Currency per ton of cargo carried per lay day saved on vessels definitely named at time of charter as mail vessels or vessels operating on customary scheduled sailings with general cargo.

If such Vessel operating on customary scheduled sailings elects to deliver by lighter instead of at berth designated by the Charterer or his agent, the cargo may be so discharged into lighters at the risk of the cargo but at the expense of the Vessel, and it is mutually understood and agreed that each lighter shall be discharged within five (5) days after same is loaded, and for each and every day's detention of the lighter or lighters beyond the free period, demurrage shall be paid by the cargo at the current rate of the port for each lighter so detained and shall constitute a lien on the goods, but no demurrage shall accrue to the Vessel.

On mail vessels and on vessels operating on customary scheduled sailings, no demurrage shall be charged at port of loading, but the Owner reserves the right to sail the Vessel without cargo, and the Charterer shall be liable for dead freight if cargo is not tendered in time to enable the Vessel to load and sail on schedule.

If demurrage is incurred as despatch is earned, it shall be computed on the basis of a twenty-four (24) hour day.

Demurrage at loading ports shall be endorsed upon bills of lading, but whether so endorsed or not, upon proof of its having been incurred, shall become a lien upon the cargo and shall be collectible in the same manner as the freight money.

Despatch at loading port shall be endorsed upon bills of lading, but whether so endorsed or not, upon proof of its having been earned, shall be deducted upon settlement of freight.

In the event of any stoppage of work caused by adverse weather conditions, lay days shall be extended for a corresponding period in the determination of demurrage but not in the determination of despatch.

Shore Tally-men, if required, to be employed by the vessel at the expense of the vessel.

Fifth. Bills of lading on approved form shall be signed without prejudice to this charter, and subject to this contract as to freight, dead freight, and all other conditions, including loading, discharging, demurrage and despatch. Captain to sign bills of lading as presented for full or partial lots as soon as sugar is loaded on board, making proper notation on bills of lading of "not cargo bags." All bags are to be considered cargo bags unless otherwise specified and stowed separately.

Sixth. Public Weighers' count shall be used in determining outturn of cargo, and if there be any dispute in reference to count, an adjustment of such dispute must be arrived at immediately as the truck passes over the Public Weighers' scale, which must be located near the Government scale, and this adjustment must be made by a representative each of the Shipper, the Vessel, and the Consignee, and the decision arrived at by a majority of these three parties is to be final and binding on all parties hereto. Vessel shall be furnished with as many copies of Public Weighers' certificate as may be required, free of charge.

The Vessel is to deliver the total number of bags of sugar as shown by the bills of lading. Should the Vessel fail to deliver the number of bags specified in the bills of lading the Vessel owner or agent shall pay for such shortage to the Shipper or his agent, at the market quotation on the date of entry at the Custom House at the port of discharge, less freight. In the event of the Vessel having aboard a greater number of bags of sugar than called for by the bills of lading, such greater number of bags are to be delivered where landed to the order of the Shipper or his agent. All sugar cargo on board to be delivered.

Seventh. The Vessel shall have the liberty to tow and be towed, and to assist vessels in all situations, and to call at any port or ports for coal or other supplies or both.

(Brokers.)

WATER & SUGAR

The original charter in our possession.

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passes over the Public Weighers' scale, which must be located near the Government scale, and this adjust- 150
ment must be made by a representative each of the Shipper, the Vessel, and the Consignee, and the deci- 151
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the Vessel fail to deliver the number of bags specified in the bills of lading the Vessel owner or agent 155
shall pay for such shortage to the Shipper or his agent, at the market quotation on the date of entry at 156
the Custom House at the port of discharge, less freight. In the event of the Vessel, having aboard a 157
greater number of bags of sugar than called for by the bills of lading, such greater number of bags are 158
to be delivered where landed to the order of the Shipper or his agent. All sugar cargo on board to be 159
delivered. 160

Seventh. The Vessel shall have the liberty to tow and be towed, and to assist vessels in all situations, 161
and to call at any port or ports for coal or other supplies or both. 162

Eighth. ~~Extra insurance premium, if any, above the customary minimum rates, to be paid by the Ves-~~ 163
~~sel but in no case more than~~ ~~cents per \$100.00 which sum is to be deducted from~~ 164
~~the freight charges.~~ 165

Ninth. The cargo or cargoes shall be delivered and received alongside the Vessel, where she can load 166
and discharge always safely afloat, and proceed and return always safely afloat, within reach of her tackle, 167
and lighterage and also extra lighterage, if any, shall be at the risk and expense of the cargo. 168

Tenth. The Vessel shall be discharged at such wharf as Charterer may designate, where she shall 169
pay not more than the established legal rate of wharfage, and where she may safely lie afloat and wholly 170
alongside. The Vessel is to leave receiver's berth immediately upon completing delivery, weather and tide 171
permitting. The Vessel will discharge at a second berth at the same discharging port, provided that the 172
consignee pays for all extra expense of shifting, time for shifting to count. 173

Eleventh. The Vessel shall have an absolute lien on cargo, for freight, dead freight and demurrage, 174
and any other charges due hereunder. 175

Twelfth. Lay days, if required by Charterer shall not commence before 176
Charterer or his agent have the privilege of cancelling this charter should the Vessel not be at loading 177
post ready for cargo by 178

Thirteenth. Owner to appoint and pay agents at loading and discharging ports to attend to ship's 179
business. 180

Fourteenth. The Vessel shall be free of all weighing expenses at port of discharge, notwithstanding 181
any custom of the port to the contrary. 182

Fifteenth. Any and all differences and disputes of whatsoever nature arising out of this charter shall 183
be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to 184
the provisions of the United States Arbitration Act (Title 9 of U. S. C., Chapter 213 of the Act of Feb. 12, 185
1925, 43 Stat. 833), except that the provisions of Section 8 thereof shall not apply to any arbitration here- 186
under. The decision of any two of the three on any point or points shall be final. Either party hereto 187
may call for such arbitration by service upon any officer of the other, wherever he may be found, of a 188
written notice specifying the name and address of the arbitrator chosen by the first moving party and a 189
brief description of the dispute or differences which such party desires to put to arbitration. If the other 190
party shall not, by notice served upon an officer of the first moving party within twenty days of the serv- 191
ice of such first notice, appoint its arbitrator to arbitrate the dispute of differences specified, then the 192
first moving party shall have the right without further notice to appoint a second arbitrator, who shall 193
be a disinterested person, with precisely the same force and effect as if said second arbitrator had been 194
appointed by the other party. In the event that the two arbitrators fail to appoint a third arbit- 195
rator within twenty days of the appointment of the second arbitrator, either arbitrator may apply 196
to a Judge of any court of competent jurisdiction in the city above mentioned for the appointment 197
of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall 198
have precisely the same force and effect as if such arbitrator had been appointed by the two arbit- 199
rators. Until such time as the arbitrators finally close the hearings either party shall have the 200
right by written notice served on the arbitrators and on an officer of the other party to specify 201
further disputes or differences under this Charter for hearing and determination. Awards made in 202
pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and 203
judgment may be entered upon any award made hereunder in any Court having jurisdiction in the 204
premises. 205

Sixteenth. Neither the carrier nor any corporation owned or employed by, subsidiary to or associated 206
or affiliated with or furnishing wharfage to the carrier shall be liable for any loss or damage to the goods 207
occurring at any time, and even though before loading on or after discharge from the vessel, by reason of 208
of any fire whatsoever, unless such fire shall be caused by its design or neglect. 209

Seventeenth. A commission of 1% upon the gross freight under this Charter is due and payable 210
by the Vessel and Owner, upon payment of freight, to Charterer's Brokers, Victor B. Barnes. 211

All arrangements for weighers, samplers and other Customs formalities in connection with the cargo 212
to be taken care of by the consignee and any delay in loading or discharging due to the failure of con- 213
signee to make such arrangements shall count as laytime. 214

Clauses Eighteen, Nineteen and Twenty (Lines 215 to 327)
printed on reverse side of this form are a part of this Charter.

This Charter Party to be a continuation of
second (2nd) to 450 under Charter Party dated
July 23, 1942.

IN WITNESS WHEREOF, the Charterer and the Vessel have signed the day and date first above written.

Eighteenth. All bills of lading issued hereunder shall contain, directly or by reference, the following clauses: 215

(i) Clause Paramount: 216

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further." 217

(ii) Both-To-Blame Collision Clause: 218

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or noncarrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or noncarrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or noncarrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact." 219

(iii) General Average Clause: 220

"General average shall be adjusted, stated, and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees, or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money." 221

(iv) Amended "Jason" Clause: 222

"In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers." 223

(v) In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is likely to give rise to risk of capture, seizure, detention, damage, delay, or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon their failure to do so, may warehouse the goods at the risk and expense of the goods; or the carrier or master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, wharf or other place; or the ship may proceed or return directly or indirectly, to or stop at any such port or place whatsoever as the master of the carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the carrier or the master may retain the cargo on board until the return trip or until such time as the carrier or the master thinks advisable and discharge the goods at any place whatsoever as herein provided or the carrier or the master may discharge and forward the goods by any means at the risk and expense of the goods. The carrier or the master is not required to give notice of discharge of the goods, or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete release, and performance under this contract and the carrier shall be freed from any further responsibility. 224

voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute to the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers."

(v) In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is likely to give rise to risk of capture, seizure, detention, damage, delay, or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon their failure to do so, may warehouse the goods at the risk and expense of the goods; or the carrier or master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft or other place; or the ship may proceed or return directly or indirectly, to or stop at any such port or place whatsoever as the master of the carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the carrier or the master may retain the cargo on board until the return trip or until such time as the carrier or the master thinks advisable and discharge the goods at any place whatsoever, as herein provided or the carrier or the master may discharge and forward the goods by any means at the risk and expense of the goods. The carrier or the master is not required to give notice of discharge of the goods, or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility. For any service rendered to the goods as herein provided the carrier shall be entitled to a reasonable extra compensation.

(vi) The carrier, master and ship shall have liberty to comply with any orders or directions for loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The carrier may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

In addition to all other liberties herein the carrier shall have the right to withhold delivery of, reship to, deposit or discharge the goods at any place whatsoever, surrender or deposit of the goods at any place and with any direction, condition or agreement imposed upon or exacted from the carrier by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the goods shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the owner or consignee thereof and shall be a lien on the goods.

This charter shall also be subject to the provisions of paragraph (iii), (iii), (iv), (v) and (vi) of Clause Eighteen.

Nineteenth. The Master and the Vessel shall have liberty to comply with any orders or directions for loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel. Provided, however, That whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions issued by the Charterer as to the employment of the Vessel, the Master shall obey the sailing directions of the Charterer or its agents or to a representative of the United States if such representative is present on board and shall not comply with such orders or directions unless such consent or approval has been obtained. Provided further, however, That if it is impracticable or impossible to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be final with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel and cargo.

Twentieth. If the United States of America is a party to a treaty, convention, agreement or arrangement, the Congress, non-Resident Commissioner, shall be authorized to ratify, execute or accede to any benefit that may arise therefrom, except as provided in section 110 of the Act approved March 1917.

To the true and faithful performance of all and every one of the foregoing agreements, the parties do hereby bind their heirs, executors, administrators, assigns and assigns in law, and the sum of the proved damages, but not exceeding the stipulated amount, shall be paid.

This agreement is subject to the approval of the United States Maritime Commission and to the conditions imposed by said Commission pursuant to the Ship War Risk Act, approved March 1917.

1903

Twenty-first. If necessary to shift barge at loading port, shifting charges for account of charterer.

Twenty-second. Fuel-power to be furnished by Owners and all towing charges to be for account of Owners.

Twenty-third. Wherever the word "vessel" or "steamer" appears it is understood "barge" shall apply.

Twenty-fourth. It is mutually understood and agreed that this vessel has no loading or discharging gear and the necessary gear for loading and discharging will be furnished to Charterer at Charterers' risk and expense.

Twenty-fifth. This Charter Party is to remain in effect for one (1) voyage.

Twenty-sixth. Any increase in freight including surcharge, if any, and/or any change in terms and conditions of charter party in effect and approved by the U. S. Maritime Commission or War Shipping Administration at the time vessel tenders for loading under this Charter to apply.

IN WITNESS WHEREOF, we hereunto set our hands the day and year first above written.

Made and signed in duplicate.

SMITH-ROWLAND CO., Inc.

By C. E. Gettinger (sgd)
Vice-President

The American Sugar Refining Company

(sgd) P. M. Ripley

24

On the 9th day of April, 1943, NOTICE OF AP-
PEAL was filed, in words and figures as follows:

(Title Omitted.)

"Sirs:

Please Take Notice that The American Sugar Refining Company appeals to the United States Circuit Court of Appeals for the 5th Circuit from the final decree entered herein on January 14, 1943, as of January 12, 1943, and from each and every part thereof.

Dated, Miami, Florida, April 9th, 1943.

Yours, etc.,

BATCHELOR & DYER,

Ingraham Building,
Miami, Florida.

and

BIGHAM, ENGLAR, JONES &
HOUSTON,

Proctors for Libelant.

99 John Street,
New York, N. Y.

To: Edwin R. Williams, Esq.,
Clerk of the United States District
Court for the Southern District
of Florida, Miami Division.

Cody Fowler, Esq.,
Proctor for Claimant-Respondent."

On the 9th day of April, 1943, STIPULATION was filed as of January 8, 1943, in words and figures as follows:

(Title Omitted.)

"A libel having been filed herein on the 6th day of January, 1943, demanding damages in an alleged cause of contract and cargo damage, civil and maritime; and process in rem, and in personam with clause of foreign attachment having been issued; and the barge 'Anaconda' having been attached by the United States Marshal for this District by virtue of such process:

Now, in consideration of the consent of libelant to the release of the barge 'Anaconda' from attachment, and of the further agreement on the part of the libelant to refrain from again seeking the attachment of said barge in this suit or in any other suit involving the same subject matter, United Kingdom Mutual Steam Ship Assurance Association, Limited, agrees that this stipulation may stand as a substitute for the barge 'Anaconda' in this suit; and hereby guarantees to pay any final decree which may be rendered against the barge 'Anaconda' or against Smith-Rowland Company, Inc., by this Court in this suit, or, if an appeal intervene, by any Appellate Court; not, however, exceeding the value of the barge 'Anaconda' at the conclusion of the voyage described in the libel; and reserving to claimant-respondent the right, if any be given by law, to appeal from any such final decree, or decree of any Appellate Court.

It is understood that this agreement binds only the United Kingdom Mutual Steam Ship Assurance Association, Limited, and not Monroe & Ard or John C. Monroe.

This agreement is signed by Monroe & Ard on behalf of the United Kingdom Mutual Steam Ship Assurance Asso-

ciation, Limited, in this particular transaction pursuant to special cable authority received January 7, 1943, by Monroe & Ard from Thomas R. Miller & Son, Managers of said Association.

Dated, New York, N. Y., January 8, 1943.

UNITED KINGDOM MUTUAL
STEAM SHIP ASSURANCE
ASSOCIATION, LIMITED,

By MONROE & ARD,

As Attorney-in-Fact for the
above limited purpose only,

By JOHN C. MONROE.

We hereby consent to the substitution of the foregoing stipulation for the barge 'Anaconda' in this suit, consent to the release of the said barge from attachment in this suit, and agree to refrain from again seeking the attachment of said barge in this suit, or in any suit involving the same subject matter.

THE AMERICAN SUGAR RE-
FINING COMPANY,

By BIGHAM, ENGLAR, JONES &
HOUSTON,

Proctors for Libelant.

Filed this April 9th, 1943, as of January 8th, 1943.

JOHN W. HOLLAND,
Judge."

26

On the 9th day of April, 1943, ASSIGNMENT
OF ERRORS was filed, in words and figures as
follows:

(Title Omitted.)

"Libelant, The American Sugar Refining Company, as-
signs errors to the findings of fact and conclusions of law

of this Court, entered herein on the 14th day of January, 1943, and to the final decree, entered herein on January 14, 1943, as of January 12, 1943, as follows:

1. In that the Court found that it had no jurisdiction in admiralty except under the provisions of the Arbitration Act (9 U. S. C., §§-15).

2. In that the Court found that the provisions of the charter party do not seek to oust this Court of jurisdiction.

3. In that the Court found that the provisions of Section 8 of the United States Arbitration Act (9 U. S. C., 8) could be waived by private contract.

4. In that the Court found that provisions of Section 3 of the United States Arbitration Act (9 U. S. C., 3) were not applicable.

5. In that the Court found that the provisions of Paragraph 15th of the charter party were valid in their entirety.

6. In that the Court found that libelant had violated the provisions of the charter party in filing the libel.

7. In that the Court dismissed the libel and ordered the release of the vessel from attachment.

Dated Miami, Florida, April 9th, 1943.

BATCHELOR & DYER,
BIGHAM, ENGLAR, JONES &
HOUSTON,

Proctors for Libelant,

By O. D. BATCHELOR.

A copy of the Notice of Appeal, Petition for Appeal, and Assignment of Errors is hereby acknowledged as received this 9th day of April, 1943.

CODY FOWLER,
By RALPH O. CULLEN,
Proctor for Claimant-
Respondent."

On the 14th day of April, 1943, BOND FOR COSTS ON APPEAL was filed in words and figures as follows:

(Title Omitted.)

"Know All Men By These Presents, That we, The American Sugar Refining Company, a New Jersey corporation, as principal, and Seaboard Surety Company, a New York corporation, as Surety, are held and firmly bound unto Barge 'Anaconda' and Smith-Towland Company, Inc., in the sum of two hundred and fifty (\$250.00) Dollars, to be paid to said Barge 'Anaconda' and Smith-Rowland Company, Inc., their successors and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated the 13th day of April, 1943.

Whereas, The American Sugar Refining Company, as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, from a decree of the District Court of the United States for the Southern District of Florida, bearing date the 12th day of January, 1943, in a suit wherein The American Sugar Refining Company is libellant against Barge 'Anaconda' and Smith-Rowland Company, Inc.:

Now, Therefore, the condition of this obligation is such that if the above named appellant, The American Sugar Refining Company, shall prosecute said appeal with effect, and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

THE AMERICAN SUGAR RE-
FINING COMPANY, a New
Jersey Corporation,
By O. D. BATCHELOR,
Agent and Proctor.

**SEABOARD SURETY COM-
PANY, a New York Corpora-
tion,**

**By JANE K. HOPKINS,
Stipulator.**

(Corp Seal)

**Taken and approved before me this 14th day of April,
A. D. 1943.**

(Seal)

**EDWIN R. WILLIAMS,
Clerk U. S. Dist. Court,
By ANNA M. FITZSIMMONS,
Deputy Clerk."**

**28. On the 24th day of April, 1943, DIRECTIONS
TO CLERK FOR PREPARING TRANSCRIPT OF
RECORD ON APPEAL was filed, in words and figures as
follows:**

(Title Omitted.)

**The Clerk of the above styled Court will please include
in the transcript of record on appeal the following instru-
ments:**

Libel and Complaint filed January 6, 1943.

Order for Process filed January 6, 1943.

Request for Dismissal filed January 7, 1943.

Order of Dismissal filed January 7, 1943.

**Special Appearance and Exception to Jurisdiction filed
January 9, 1943.**

Order of Court filed January 9, 1943.

Proof of Publication filed January 11, 1943.

Attachment filed January 12, 1943.

Monition filed January 12, 1943.

Writ of Restitution filed January 12, 1943.

Attachment filed January 12, 1943.

Monition filed January 12, 1943.

Findings of Fact and Conclusions of Law, filed January 14, 1943.

Order of Court filed January 14, 1943.

Writ of Restitution filed January 19, 1943.

Two Exhibits filed before Judge Holland on January 12, 1943, one named Bill of Lading and the other Sugar Charter Party.

Notice of Appeal filed April 9, 1943.

Stipulation filed April 9, 1943, as of January 8, 1943.

Assignment of Errors filed April 9, 1943.

Bond for Costs on Appeal filed April 14, 1943.

These Directions, filed April 24, 1943.

BIGHAM, ENGLAR, JONES &
HOUSTON and
BATCHELOR & DYER,
By O. D. BATCHELOR,
Proctors for Libelant.

The undersigned proctor for Claimant-Respondent consents to the inclusion of the above named papers in the Transcript of Record on Appeal, same constituting all the proceedings had in this case.

CODY FOWLER,
By CODY FOWLER,
Proctor for Claimant-
Respondent.

29

CLERK'S CERTIFICATE.

In the United States District Court in and for the Southern
District of Florida, Miami Division.

The American Sugar Refining Company, Libelant,

vs.

Barge "Anaconda" and Smith-Rowland Company, Inc.,
Respondents.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, do hereby certify that the foregoing pages numbered 1 to 28, both inclusive, present a true, full and correct copy of the proceedings had, and orders entered, as therein stated, in Case No. 355-M-Adm., wherein The American Sugar Refining Company was Libelant, and Barge "Anaconda" and Smith-Rowland Company, Inc., were Respondents, as the same appears of record and on file in this office.

Witness my official signature, and the seal of said District Court, at my office in the City of Miami, State of Florida, this 27th day of April, A. D. 1943.

EDWIN R. WILLIAMS,

(Seal)

Clerk, United States District
Court, Southern District of
Florida,

By EARLE F. SPRIGG,
Deputy Clerk.

[fol. 48] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 20, 1943

No. 10671

AMERICAN SUGAR REFINING COMPANY

versus

BARGE "ANACONDA" and SMITH-ROWLAND COMPANY, INC.

On this day this cause was called, and, after argument by Henry N. Longley, Esq., for appellant, and Cody Fowler, Esq., for appellees, was submitted to the Court.

[fol. 49] OPINION OF THE COURT—Filed November 9, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 10671

AMERICAN SUGAR REFINING COMPANY, Appellant,

versus

BARGE "ANACONDA" and SMITH-ROWLAND COMPANY, INC.,
Appellees

Appeal from the District Court of the United States for the
Southern District of Florida

(November 9, 1943)

Before Hutcheson and Holmes, Circuit Judges, and Russell,
District Judge

HUTCHESON, Circuit Judge:

Appellant filed its libel *in rem* against the barge "Anaconda" and *in personam* against Smith-Rowland Company, Inc., its owner. In due course the barge was seized under

[fol. 49-1] process *in rem* and as Smith-Rowland Company's property under foreign attachment in the suit *in personam*. Appellee Smith-Rowland Company, Inc. appeared specially and excepted to the jurisdiction of the court on the grounds: that the contract of charter-party on which the libel was based contained a provision for arbitration; that jurisdiction of the cause of action set out in the libel existed, therefore, only by reason of the U. S. Arbitration Act 9, U. S. C. 1; and that the parties, having provided that "the provisions of Sec. 8 of the Act shall not apply to any arbitration thereunder", thereby agreed to and did oust the jurisdiction *in rem* of the admiralty courts and deprive those courts of the right to proceed by libel and seizure of the vessel or other property according to the usual course of admiralty proceedings. The district judge treated the exception as a motion to dismiss; held that the invoked provision of the charter-party¹ was a valid agreement to waive security pending arbitration, and had the effect of ousting the admiralty jurisdiction based on seizure;² declined the libelant's request to stay the proceedings under Sec. 3 of the Act; and dismissed the libel. Libelant is here insisting that, in so ruling, the district judge completely misapprehended the nature and effect of the invoked agreement, and particularly misapprehended the purport and effect of the

¹"Fifteenth: Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge unless the parties hereto otherwise agree pursuant to the provisions of the United States Arbitration Act (Title 9, of U. S. C. A., Chapter 213 of the Act of Feb. 12, 1925, 43 Stat. 833) except that the provisions of Section 8 thereof shall not apply to any arbitration thereunder."

²"By Sec. 8 there is preserved the recognized right of a proposed libelant to proceed with libel to obtain the seizure of the vessel or other property of the alleged offending party. By written agreement members to a charter-party may agree for arbitration of their differences, and may further agree to forego the rights preserved by Sec. 8 during the period of arbitration. Thereby the parties to the charter-party do not attempt to do violence to Courts of admiralty in the exercise of jurisdiction over parties and subject matter."

arbitration act and its effect upon agreements attempting [fol. 49-2] to oust the established jurisdiction in admiralty and to provide that parties may not resort to the procedure provided by the Act.

We agree with appellant. The libel sets out a course of action within the admiralty jurisdiction. This being so, and jurisdiction having been obtained by seizure in accordance with recognized admiralty procedure and the provisions of the Act, it should have been maintained. The district judge thought and said that the charter-party agreement, "except that the provisions of Sec. 8 thereof shall not apply to any arbitration hereunder", was an effective waiver not only of the right to invoke the *in rem* jurisdiction of admiralty but also, because the vessel had been seized under foreign attachment, of the right to proceed *in personam*. But this will not at all do. The law is, and always has been, in the absence of a statute authorizing them to do so, that parties may not by private agreement oust the jurisdiction of the courts, 3 Am. Jur. Sec. 4, p. 834 et seq. It was, therefore, settled law that prior to the enactment of the arbitration act, an agreement to arbitrate would not be specifically enforced in United States Courts, nor was it recognized as a defense to an action.³ The act was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.⁴

Assuming then, without deciding, that the provision for excepting section 8 had the purpose attributed to it by the district judge of preventing the filing of a libel *in rem* or the issuance of seizure process and thus of ousting to that extent the jurisdiction of the admiralty courts and nullify- [fol. 50] ing the provision of Sec. 8 of the act expressly au-

³ Continental Grain Co. vs. Dant, 118 F. (2) 967; Red Cross Line vs. Atlantic Fruit Co., 264 U. S. 109; Insurance Co. vs. Morse, 20 Wallace 445; Tatsuma K. K. vs. Prescott, 4 F. (2) 670 (C. C. A. 9); Monahan v. S. S. Howick Hall, 10 F. (2) 162. See also Petition of Pahlberg, 43 Fed. Sup. 761.

⁴ In Re: Utility Oil Corp., 69 Fed. (2) 525. Cf. Petition of Pahlberg, *supra*.

thorizing such procedure, such purpose cannot be given effect. We suppose no one would claim validity for an arbitration agreement which provided broadly that no suit of any kind could be brought in an admiralty court and that none of the provisions of the arbitration act should apply. The clause in question, if given the effect contended for it, is, to the extent that it ousts the jurisdiction of the court and nullifies the provisions of the act, as clearly invalid as the more general one would be. It must be remembered that Sec. 8 of the Act did not confer jurisdiction in admiralty to proceed by seizure *in rem* or in aid of a suit *in personam*. That jurisdiction had long existed in admiralty, that jurisdiction parties to an arbitration agreement cannot agree away. The purpose and effect of Section 8 was to leave in no doubt that the right conferred by Section 4 in effect to require specific performance of an arbitration agreement would be available as well in suits where property was seized as in those where it was not. Courts will not construe an arbitration agreement as ousting them of their jurisdiction unless such construction is inevitable, *Am. Gty. Co. vs. Caldwell*, 72 Fed (2) 209. In consonance with that rule, the clause excepting Section 8 should be given the effect, and that only, of providing that the parties could, but they were not obliged to resort to arbitration without first proceeding by seizure as provided for in Sec. 8. So construed, as permitting, but not binding, the parties not to invoke the provisions of Sec. 8 as a condition of arbitration, the agreement would be valid, and if, without suing, the parties had completely executed the agreement to arbitrate, it might well be that the waiver of proceedings under Sec. 8 could have been enforced. But an arbitration agreement may be repudiated, waived or abandoned by one or both of the parties to it.⁵ Appel- [fol. 51] lant's act, in electing to sue without advertising to or declaring on the arbitration agreement, was an attempted repudiation of the agreement, and while appellee, if it elected to hold to it, had the right, to plead the agree-

⁵ The Quarrington Court, 25 Fed. Sup. 665; The Belize, 25 Fed. Sup. 663; Krauss Bros. vs. Bossert, 62 F. (2) 1004; Galion Iron Works vs. Adams Mfg. Co., 128 F. (2) 411; LaNacional Platanera vs. N. A. Fruit & Steamship Corp., 84 F. (2) 881.

ment to arbitrate as a defense, to obtain its enforcement, and to stay the suit while the arbitration proceedings were going forward, the agreement did not oust the jurisdiction of the court to entertain the suit. It did not give appellee the right to have the suit dismissed. The judgment dismissing the suit was wrong. It is reversed, and the cause is remanded for further and not inconsistent proceedings.

[fol. 52]

JUDGMENT

Extract from the Minutes of November 9th, 1943

No. 10671

AMERICAN SUGAR REFINING COMPANY

versus

BARGE "ANACONDA" and SMITH-ROWLAND COMPANY, INC.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered, adjudged and decreed by this Court, that the appellees Barge "Anaconda" and Smith-Rowland Company, Inc., and the surety on the stipulation for value for the release of the Barge "Anaconda", United Kingdom Mutual Steam Ship Assurance Association, Limited, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 53] MOTION AND ORDER STAYING MANDATE—Filed December 6, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10671

AMERICAN SUGAR REFINING COMPANY, Appellant,

VS.

BARGE "ANACONDA" AND SMITH-ROWLAND COMPANY, INC.,
Appellees

Petition to Stay Mandate

Come now the appellees by their proctor undersigned and respectfully move this Honorable Court or any Judge thereof, to stay for a period of thirty (30) days the issuing of the mandate, judgment and decree in this cause. The purpose of this application is to permit appellees, Barge "Anaconda" and Smith-Rowland Company, Inc., to file an application for a certiorari before the Honorable Supreme Court of the United States of America to review the judgment of this Honorable Court entered herein on the 9th day of November, 1943.

(Signed) Cody Fowler, Proctor for Barge "Anaconda" and Smith-Rowland Company, Inc.

[fol. 54] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10671

AMERICAN SUGAR REFINING COMPANY, Appellant,

Versus

BARGE "ANACONDA" AND SMITH-ROWLAND COMPANY, INC.,
Appellees

On consideration of the application of the appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees to apply

for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 1st day of December, 1943,

(Signed) E. R. Holmes United States Circuit Judge.

[fol. 54½] ORDER FURTHER STAYING MANDATE—Filed December 31, 1943

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10671

AMERICAN SUGAR REFINING COMPANY, Appellant,

versus

BARGE "ANACONDA" AND SMITH-ROWLAND COMPANY, INC.,
Appellees

On consideration of the application of the appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from January 1, 1944;

the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from January 1, 1944 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed; and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from January 1, 1944, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 31st day of December, 1943.

(Signed) E. R. Holmes United States Circuit Judge.

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 28, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.